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Nos. 179 to 182 inc.

JUN 4

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No.

FARBWERKE vormals MEISTER LUCIUS & BRUNING; DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT vorm. ROESSLER, and BADISCHE-ANILIN & SODA-FABRIK,

Petitioners,

against

CHEMICAL FOUNDATION, INC.; E. I. duPONT deNEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States,

Respondents.

SUPPLEMENTAL BRIEF IN BEHALF OF PETITIONER, BADISCHE-ANILIN & SODA-FABRIK.

ALMUTH C. VANDIVER,
Attorney for Petitioner,
Badische-Anilin & Soda-Fabrik.

[NOTE: For Additional Captions See Inside Front Cover.]

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SUPPLEMENTAL BRIEF IN BEHALF OF PETITIONER, BADISCHE-ANILIN & SODA-FABRIK.

This is a petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit to review the decrees of that Court, entered March 4, 1930, affirming decrees of the United States District Court for the District of Delaware.

The Circuit Court of Appeals has declared Section 19 of the "Settlement of War Claims Act of 1928" approved March 10, 1928, amending Section 10 (f) of the Trading with the Enemy Act to be unconstitutional.

This decision presents "an important question of federal law which has not been but should be settled by this Court" (Par. 5, subd. (b) of Rule 38 of the Supreme Court Rules).

The judgment of the Circuit Court of Appeals affirmed a decree of the District Court for the District of Delaware, dismissing the complaints of the plaintiffs, Farbwerke vormals Meister, Lucius & Bruning, Deutsche Gold & Silber Scheide Anstalt vormals Roessler and Badische Anilin & Soda Fabrik, hereinafter referred to as the "alien appellants", against the appellee E. I. du Pont deNemours & Company, hereinafter referred to as "duPont", and the appellee Walter O. Woods, as Treasurer of the U. S.

These complaints asked for the fixation by the Court of reasonable royalties for the use by the appellee duPont, of certain patents of the alien appellants prior to the assignment of the same, by the Alien Property Custodian,

to the appellee Chemical Foundation, Inc., hereinafter referred to as "the Foundation". The complaints further prayed that the Treasurer of the U. S. be directed to pay to the alien appellants, out of the monies deposited with him by duPont such amount as might be necessary to satisfy the Court's judgment.

STATEMENT OF FACTS.

April 6, 1917, the United States entered the war with Germany.

October 6, 1917, the Trading with the Enemy Act became effective.

Section 10, subdivision (f) of this Act is as follows:

> "(f) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyright matter; provided, however, That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit; provided further, That the licensee may make any and all defenses which would be available were no license granted. The court on due pro-

ceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

"If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable."

Section 10, subdivision (c), of the same Act provided that the President might license any American indi-

vidual or corporation to use during the war any process under any patent "owned or controlled by an enemy" and might fix the fee for such license.

October 12, 1917, the President delegated his licensing authority under Section 10 to the Federal Trade Commission (Executive Order of October 12, 1917).

January 21, 1918, duPont was licensed by the Federal Trade Commission to make, use and vend certain inventions relating to indigo production, referred to in United States Letters Patent of the alien appellants who were then enemy owners thereof.

November 4, 1918, the Congress amended Section 7, subdivision (c), and authorized the Alien Property Custodian to seize enemy-owned patents.

Thereafter the patents affected by this litigation were seized by the Alien Property Custodian and the seizures recorded in the office of the Commissioner of Patents on February 21, 1919 and March 26, 1919, respectively.

On or about April 10, 1919, the Alien Property Custodian assigned the seized patents affected by this litigation, with others, to the Foundation.

July 1, 1921, war with Germany officially ended.

Within one year thereafter the alien appellants, claiming to be the owners of the patents, in conformity with Section 10 (f) of the Trading with the Enemy Act, brought suit against duPont for the fixation of a reasonable royalty for the use by duPont under the Federal Trade Commission licenses of the patents affected by this litigation.

At the same time, the Foundation, claiming to be the owner, brought similar suits against duPont.

The alien appellants and the Foundation, under the provisions of Section 10 of the Trading with the Enemy Act, joined the Treasurer of the United States as a party.

On the 11th day of October, 1926, this Court decided in the case of *U. S.* v. *Chemical Foundation* that the Foundation was the owner of the patents in suit.

On March 10, 1928, the War Claims Settlement Act of 1928 was approved by the President.

Section 19 of that Act is as follows:

> "Sec. 19. Subsection (f) of section 10 of the Trading with the Enemy Act, as amended, is amended by adding at the end thereof the following new paragraph:
>
> > 'In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred or delivered to the Alien Property Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trade-mark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label, or copyright, was seized or otherwise acquired by the Alien Property Custodian.' "

This statute provides that German Nationals owning patents immediately prior to the seizure thereof by the

Alien Property Custodian may maintain actions under Subsection (f) of Section 10 of the Trading with the Enemy Act against American licensees of such patents for the fixation of royalties prior to the sale of the patents, provided such German Nationals instituted suits for such purpose within one year after the declaration of Peace.

The six suits, aforesaid, consolidated by consent came on to be heard in the District Court of Delaware on April 30, 1928.

The alien appellants at the trial restricted their prayer to the fixation of a reasonable royalty for the period *prior to April 10, 1919, the date of the assignment of the patents by the Custodian to the Foundation.*

The Foundation asked for the fixation of a reasonable royalty only for the period *subsequent to April 10, 1919, the date the Foundation became the owner of the patents.*

The defendant duPont moved to dismiss the alien appellants' complaints on the ground that they were not the owners of the patents. The Treasurer of the United States, by the Attorney General, moved to dismiss the complaints of the Foundation and moved that the Custodian be substituted as plaintiff for the alien appellants.

On December 15, 1928, by decree, the District Court denied the motions of the Attorney General and granted the motion of duPont to dismiss the appellants' complaints.

The Circuit Court of Appeals affirmed the decree of the District Court.

ISSUES BEFORE THE DISTRICT COURT.

The alien appellants asked for the fixation of a reasonable royalty for the period prior to the sale to the Foundation.

The Foundation asked for the fixation of a reasonable royalty subsequent to this period.

DuPont opposed the fixation of a reasonable royalty as prayed for in the alien appellants' bill as limited at the trial to the period above stated.

The Attorney General opposed the fixation of a reasonable royalty for the period subsequent to sale as prayed for by the Chemical Foundation.

The Attorney General also requested substitution of the Custodian for the alien appellant plaintiffs.

There was no controversy before the Court as to the fact that the alien appellants were the owners of the patents involved in this litigation at the time of the seizure of the same by the Alien Property Custodian, and that the alien appellants had brought suit within one year after the end of the war.

The alien appellants contend that the Court erred in failing to follow the provisions of the War Claims Settlement Act of 1928 above quoted, validating the suits of the alien appellants brought in 1922 and that the judgment of the District Court affirmed by the Court of Appeals, dismissing the alien appellants' bill, accordingly should be reversed.

LOWER COURTS' REASONS FOR DISMISSING ALIEN APPELLANTS' BILLS.

Opinion of the District Court.

The District Court held that:

> "By executive action, i.e., Executive Orders of the President and assignments from the Alien Property Custodian to the Foundation the Chemical Foundation became the owner of the choses in action, or right to recover from the defendant the accrued royalties, originally belonging to the German plaintiffs. It is true that the Chemical Foundation has elected not to exercise its right to recover the accrued royalties from the defendant. But such election does not operate as an assignment of that right either to the German plaintiffs or to the Alien Property Custodian. Consequently, the German plaintiffs are without cause of action and without right to recover from the defendant the accrued royalties unless by the amendment of March 10, 1928 to sec. 10 (f) of the Trading with the Enemy Act Congress divested the Chemical Foundation of its right and revested the Germans therewith. That right is a chose in action. A chose in action is property. The fifth amendment to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, denies to the Congress power to transfer property from one to another directly or indirectly. *Ochoa* v. *Hermandez,* 230 U. S. 139, *Gilman* v. *Tucker,* 128 N. Y. 190, 28 N. E. 1040.

* * * *

"The German plaintiffs, correctly asserting that the war powers of Congress are not limited or affected by the restrictions of the fifth and sixth amendments, *Miller* v. *United States*, 11 Wall. 268, 304-305, take the position that the amendment of 1928 to section 10 (f) of the Trading with the Enemy Act was an exercise by Congress of its constitutional power to 'make rules concerning captures on land and water.' Constitution, Article I, Sec. 8. The Treaty of Peace with Germany was signed in Berlin, August 25, 1921. The President's Proclamation on November 14, 1921, declared the war 'terminated on July 2, 1921.' If, however, the Treaty of Peace did not constitute a bar to subsequent action by Congress concerning captures on land and water and the amendment of 1928 was in truth an exercise of its war powers that fact constitutes a denial that the amendment was intended to operate upon or with respect to the choses in action here involved, for that property having been on April 10, 1919 sold and passed into the channels of commerce under the express authority of Congress, Sec. 12 of the Trading with the Enemy Act, as amended March 28, 1918, 40 Stat. 460, *United States* v. *Chemical Foundation*, 272 U. S. 1, the war powers of Congress with respect to that property became, thereupon *functus officio*. After its sale the Government did not hold it and it no longer bore the stamp 'captured property.' Captured property sold under authority of Congress to American citizens passed from under the powers of Congress touching captured property as fully and completely as a patented article sold by the patentee passes from under the monopoly

of the patent. See *Chaffee* v. *Boston Belting Company,* 22 How. 217, 223. The property to which the Congress reserved the right to make disposition after the war did not include that sold under its authority during the war. The amendment of 1928 is wholly without effect upon *United States* v. *Chemical Foundation,* 272 U. S. 1, and *Hicks* v. *Anchor Packing Co.,* 16 Fed. (2d) 723, (C. C. A. 3)."

The Court of Appeals Opinion.

The Court of Appeals held:

"The right to the accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution. Subscribing to the reasoning of the learned trial judge, we hold that the Amendment of 1928, valid and useful perhaps in many situations, did not restore to the German plaintiffs ownership of either the patents or the royalties. It follows that they did not own the royalties when they filed their bills—the critical time under the statute supplying the remedy—and that, in consequence, the decrees dismissing their suits must be affirmed. * * * We subscribe to the reasoning of the learned trial judge on the main issues and the related issues of these cases and direct that the decrees be in all respects affirmed."

THE ISSUE BEFORE THIS COURT.

Shall the Judiciary give full force and effect to Section 19 of the Settlement of War Claims Act of 1928

or

Is Section 19 of the Settlement of War Claims Act of 1928 repugnant to the provisions of the Constitution, and especially the Fourth and Fifth Amendments thereto, and therefore void?

Section Nineteen (19) of the Settlement of War Claims Act of 1928 is a valid exercise of the Constitutional power of Congress to make rules concerning captures and to dispose of property of the United States.

Determination of the issues, in this case, affects monies paid to, and now held by, the Treasurer of the United States.

The monies were paid by American citizens and corporations, as license fees, for the use of enemy owned patents.

The period during which payment was made began October 6, 1917 (the effective date of the Trading with the Enemy Act) and ended July 1, 1922 (one year after the ending of the War, as proclaimed by the President).

Consideration of the nature and disposition of these funds falls within three periods, i.e.:

1. From October 6, 1917 to February 21, 1919 and March 26, 1919;

2. From February 21, 1919 and March 26, 1919 to April 10, 1919; and

3. From April 10, 1919 to July 1, 1922.

The first period comprises the time between the effective date of the Trading with the Enemy Act and the date of the seizure by the Alien Property Custodian of the patents, involved in this litigation, owned up to that time by enemies.

The second period comprises the time between seizure by the Custodian and his assignment of the patents to the Foundation.

The third period comprises the time, after assignment to the Foundation, of continued payments by American licensees under Federal Trade Commission licenses, until one year after the war.

During the first period, i.e., from October 6, 1917 to February 21, 1919 and March 26, 1919, the monies in the hands of the Treasurer were trust funds for the licensee who paid them and for the enemy owner of the patent, to be paid from the Treasury, upon the order of the Judiciary, if the enemy owner brought suit for the fixation of a reasonable royalty, within one year after the Peace. Otherwise, they were to be returned to the licensee, upon the order of the Custodian, if no suit was brought by the enemy owner. (Sec. 10, subdivisions (d) and (f).)

The pre-seizure policy of the Congress is apparent from the statute.

Capture of the *use* of enemy patents was effected.

This operated to destroy the monopoly of the patent; to render nugatory the patentee's right to exclude all others from use.

There was, at this time, neither confiscation nor sequestration of the letters patent.

Neither the letters patent nor the right to use was dedicated, freely and without restriction, to the public.

Fees were to be fixed, paid and held in the Treasury to await judicial or executive action, in conformity with the statute.

The Congressional policy undergoes a change on March 28, 1918 and November 4, 1918.

On March 28, 1918, the amendment to Section 12 of the original act enlarged the common law trustee powers of the Custodian to permit this official to exercise all the rights of ownership of seized property.

On November 4, 1918, the amendment to Section 7 (subdivision c) provided that patents, upon demand, must be transferred and assigned to the Custodian.

Section 10 (f) was not amended, in any way, until Section 19 of the War Claims Settlement Act of 1928 was passed.

The question now arises, Did the Custodian's seizure of the patents, pursuant to the power granted in these amendments, and of every right appurtenant to ownership thereof, change the statutory trust fund nature of the monies still held by the Treasurer?

In the absence of express Congressional statement to that effect, counsel for the alien appellants contend that no change of status occurred.

Title was at all times in the United States of America, either as Trustee before seizure, subject to divestment by judicial or executive action, or after seizure as absolute owner, subject to divestment only by Congress.

The Custodian's title was official and not personal. He possessed neither official nor personal statutory, or other, authority to dispose of these accumulated monies. That power resided only in Congress.

The Custodian seized "every right, title and interest" with respect to the patents, "including all damages and profits" recoverable "for past infringement".

None of the Federal Trade Commission licensees had infringed.

Subsection (c) of Section 10 provided that the license "shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent * * * against the licensee for infringement or for damages, royalty, or other money awarded on account of anything done by the licensee under such license except as provided in Subsection (f) hereof".

The Custodian's assignment to the Foundation, in addition to the patents, was of "all claims and demands for profits and damages" recoverable for "past infringement".

On March 1, 1921, the Custodian executed a further instrument of assignment to the Foundation in which he assigned thereto "all right, title and interest in and to the choses in action and the funds referred to in Section 10, Subsection (f) of the Trading with the Enemy Act" acquired by the Custodian "by virtue of the seizures" of the patents.

The Custodian's seizure vested in him no title to monies in the hands of the Treasurer and no right to transfer these monies to others.

The maximum right and interest vested in him by seizure of the patents and the incidental choses in action appurtenant thereto, which he might transfer by assignment, was the *right to sue* for royalties accruing *subsequent to assignment.*

Any other construction of his powers would permit the sale of monies in the Treasury, under the guise of assignment of choses in action for *previously accrued* royalties.

Counsel for the alien appellants are of the opinion that the decision of this question is of no materiality in the disposition of this cause.

It may be assumed that as "owner", by virtue of the Custodian's assignment, the Foundation could, one year after the war, sue for the fixation of reasonable royalties.

Counsel for the alien appellants believe this right runs only to the period *subsequent* to the taking of title to the patents.

But the determination of this question, also, is of no materiality for the reason that, if the Foundation possessed this right to sue for royalties accruing prior to taking title, it never exercised this right.

Nor has the Foundation ever asserted the right to obtain royalties for this period.

It is obvious therefore that when the War Claims Settlement Act of 1928 was passed by Congress, an accumulated fund was in the hands of the Treasurer, against which no claim had been asserted, within the statutory period, except by the former enemy owners.

The decision of this Court in *U. S.* v. *Chemical Foundation* rendered the right of the former enemy owners to maintain these suits, extremely doubtful.

THE INTENT OF CONGRESS.

The report to the Senate of its Committee on Finance, submitting the Settlement of War Claims Bill, as agreed to by the House, sets out:

> "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation. The amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner,' and in the so-called *Chemical Foundation* case decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be opened to the construction that the seizure of property under the authority of the trading with the enemy act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.

"It is to be noted, however, that even if the property should be held to have been confiscated (under the dictum of this decision), in spite of the clear intent of Congress to the contrary, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the original owner but declare it to be held for the benefit of and for ultimate return to the original owner. This is apparently just what Congress did under the terms of the Winslow Act in providing that $10,000 of the principal shall be returned to each individual owner, and that thereafter the earnings or interest on the property remaining in the hands of the Alien Property Custodian shall be paid to the owner annually up to the sum of $10,000. So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the *Chemical Foundation* case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation.

* * * *

"Under subsection (j) of section 9 of the existing law no patent could be returned which had been sold, licensed, or otherwise disposed of or which was involved in litigation, nor could the proceeds from the sale, license, or other disposition of any such patent be returned. Inasmuch as the *Chemical Foundation* case has now been decided, there is nothing to prevent the return of all patents still held by the Alien Property Custodian. Subsection (j) of section 9 of the existing law is accordingly amended to comprise two subsections, the first of which (subsec. [j]) provides for the

return of patents which have been licensed, subject to any existing license, contract, lien or encumbrance, and the second of which (subsec. [k]) provides for the return of the proceeds received from the sale, license or, other disposition. These subsections do not affect the sale to the Chemical Foundation nor the consideration received upon that sale, nor the sales to any other private interests.

"Under subsection (f) of section 10 of the existing law the Alien Property Custodian has instituted certain suits as the 'owner' of certain patents. In the event that it should ultimately be held that the suits were properly instituted the amendment proposed by the bill provides that section 9 shall apply to any royalties paid to him. Section 10 of the trading with the enemy act contains the provisions applicable to the licensing of patents, etc., prescribes the royalty to be paid, and gives to the owner of the patent the right to file a bill in equity against the licensee at any time before the expiration of one year after July 2, 1921, for the determination and payment of a reasonable royalty. Inasmuch as this section accorded full rights to the 'enemy' owner, no amendment is proposed."

REASON FOR THE ENACTMENT OF SECTION 19.

We direct the Court's attention to the last line of the foregoing:

> "Inasmuch as this section accorded full rights to the 'enemy' owner, no amendment is proposed."

This is inaccurate and obviously is in the report upon the mistaken assumption that the Alien Property Custodian had brought suits in every case where licenses were issued (Text of Report, *supra*).

The inaccuracy is corrected upon the floor of the Senate.

Senator Smoot, Chairman of the Finance Committee, presenting the Conference Report on the bill, on February 28, 1928, said:

> "The Senate amended subsection (f) of section 10 of the trading with the enemy act so as to provide that suits for reasonable royalties brought either by the original owners of the patents or by the Alien Property Custodian should be considered as having been properly brought for purposes of this section. It will be noted that subsection (1) of section 9, added by section 13 of the bill, provides that royalties recovered by the Alien Property Custodian in suits instituted by him will be returned under section 9 to the former German owner. The House receded." (Congressional Record, Feb. 28, 1928, p. 3800.)

From the foregoing, it is evident:

1. That the policy of the Congress has ever been, and still is, to retain control of the disposition of enemy property and monies held by the officers of the Government.

2. That the policy of the Congress was to return to the German National, through the instrumentality of suit by the Alien Property Custodian, such reasonable royalties, as accrued

prior to assignment to the Foundation, payable out of the funds in the hands of the Treasurer, as the Court might determine to be reasonable.

3. That when its erroneous view of the litigative vehicle for determination of this reasonable royalty with the assistance of the Judiciary, came to its attention, it amended the proposed bill, by including the former German owner as a proper party plaintiff.

THE SETTLEMENT OF WAR CLAIMS ACT (SEC. 19) WAS BINDING UPON THE LOWER COURTS AND SHOULD HAVE BEEN FOLLOWED.

Governmental power is allocated, with definiteness, in the Constitution of the United States of America, to the legislative, executive and judicial departments.

All legislative powers, i.e., the power to make laws, granted by the states in the Constitution to the Central Government are vested in the Congress. Included therein is the power to declare war "and make rules concerning captures on land and water" (Art. I, Sec. 8, subd. 10). Also the power to make all needful rules and regulations respecting property belonging to the United States (Art. I, Sec. 3, subd. 2). Also to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the Government (Art. I, Sec. 8, subd. 17).

The "judicial" power, i.e., the power to hear and determine cases in law and in equity arising, among others, between foreign citizens and citizens of one of the States,

to which the U. S. is a party, under the Constitution and laws of the U. S. is vested in the Supreme Court and in inferior Courts established by the Congress (Art. III, Secs. 1, 2).

The judicial power is limited by Section 3 of Article VI which provides that the Constitution and the laws made by the Congress pursuant thereto, with treaties, shall be the supreme law of the land, binding on the judges in every state, anything in the Constitution to the contrary notwithstanding. Judicial officers are bound by oath to support the Constitution. (Art. VI, Sec. 3.)

The lower Courts have declined to apply to the case at bar the law as enacted by the Congress.

The lower Courts, in effect, hold that the Act of Congress under consideration, is unconstitutional, for the reason that it deprives the Chemical Foundation, Inc. of property sold to it by the Executive Department of the Government.

The reasons assigned by the lower Courts for failing to follow the Settlement of War Claims Act (Section 19) will be briefly referred to.

DECISION OF THE DISTRICT COURT.

The learned District Court was of the opinion that

1. The Foundation, by virtue of the assignments of the Custodian and the decision of this Court in *U. S.* v. *Chemical Foundation*, "became the owner of the choses in action, or right to recover from the defendant (duPont), the accrued royalties originally belonging to the German plaintiffs."

2. That the German plaintiffs were without cause of action unless the Settlement of War Claims Act (Section 19) "divested the Chemical Foundation of its right and revested the Germans therewith".

3. That choses in action are property and that the Fifth Amendment to the Constitution forbids the deprivation of property without due process of law and "denies to the Congress power to transfer property from one to another, directly or indirectly".

That captured property sold under authority of Congress to American citizens, and thereby passing into the channels of commerce, was no longer within the powers of Congress touching captured property and that thereupon "the war powers of Congress with respect to that property became *functus officio*".

OPINION OF THE COURT OF APPEALS.

The Court of Appeals subscribed to the reasoning of the District Court, holding that Section 19 of the War Claims Settlement Act was "violative of the Fifth Amendment to the Constitution" and that the alien appellants were not owners of the royalties when the bills of complaint were filed in 1922, "the critical time under the statute supplying the remedy".

If the lower Courts are in error as to the unconstitutionality of Section 19 of the Settlement of War Claims

Act by reason of repugnancy to the Fifth Amendment their views as to the legislative powers of Congress becoming *"functus officio"* when monies of the United States, still held in the Treasury pass, in the judicial imagination, into "channels of commerce" while interesting are not especially important.

RELEVANCY OF THE FIFTH AMENDMENT.

If the Foundation has not been deprived of "property" without due process of law, the question of unconstitutionality is entirely moot.

The Foundation certainly has not been deprived of monies still held by the Treasurer.

It has been deprived of no right to sue for royalties.

The original Trading with the Enemy Act fixed a time limit within which this right should be exercised by any "owner".

Six years after this time limitation expired, still unexercised by the Foundation, the Congress passed the War Claims Settlement Act of 1928.

The Foundation is exercising its right to sue, in the very litigations now before the Court, but only for the period subsequent to April 10, 1919. And no one is contesting their right to recover.

The Foundation has not heretofore asserted and is not now asserting any title to the monies in the hands of the Treasurer, accruing before April 10, 1919, or any right to receive the same by judicial process.

It is perfectly obvious therefore that when Section 19 of the War Claims Settlement Act of 1928 became effective, the Foundation was deprived of neither money, property, nor chose in action, nor right to sue.

THE QUESTION OF CONSTITUTIONALITY IS MOOT.

The respondent, duPont, raised the issue of constitutionality below.

The Foundation did not.

It is well settled, in this Court, that no person unaffected by unconstitutional aspects of legislation may raise the question.

In view of all of the foregoing, it is respectfully submitted that the prayer of the petitioners should be granted.

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